STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
JUDGES WILDER, HOOD, AND WHITE

E. W. RAKESTRAW,

Plaintiff-Appellee,

v

GENERAL DYNAMICS LAND SYSTEMS,

Defendant-Appellant.
_____/

S. C. NO.: 120996

AMICI CURIAE BRIEF OF MICHIGAN SELF-INSURERS' ASSOCIATION AND MICHIGAN MANUFACTURERS' ASSOCIATION

SUBMITTED BY:

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ISSUE

ARE MERE SYMPTOMATIC EXPRESSIONS OF NON-WORK-RELATED CONDITIONS AT THE WORKPLACE ACTIONABLE UNDER THE WORKER'S DISABILITY COMPENSATION ACT?

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of defendant-appellant's appendix).

Prior to working for defendant, plaintiff suffered upper back (cervical) problems and underwent two cervical surgeries (16a). While working for defendant, plaintiff again experienced cervical problems primarily as a result of holding his head in a static position and using a computer (19a). He claimed a work-related cervical disability as a result (14a).

The trial Magistrate, after wavering, resolved the case as presenting a "condition of the aging process," given that degenerative arthritis at the locales of the prior cervical surgeries was the primary source of plaintiff's present cervical complaints (21a; 26a). The Magistrate found work activities did not change the underlying pathology of plaintiff's pre-existing cervical condition, but work activities did aggravate the symptoms of the underlying condition in a significant manner (21a). Therefore, the Magistrate found plaintiff's claim compensable under MCL 418.301(2) and *Mattison v Pontiac Osteopathic Hospital*, 242 Mich App 664; 620 NW2d 313 (2000).

On defendant's appeal, the Worker's Compensation Appellate Commission affirmed. The Appellate Commission rejected defendant's argument that "'the symptoms of pain from the existing condition in the neck of the employee do not constitute a *personal injury*' compensable under the Act." (27a). The Commission did so while "encourag[ing]" review of the issue by the courts given Court of Appeals' precedent which "establish[es] a course quite different from what many believe the higher court had in mind." (30a; 29a, respectively).

On further appeal, the Court of Appeals denied defendant's application for leave to appeal in a 2-1 ruling. In dissent, Judge Wilder would have granted leave because "appellant presents a compelling case that these prior decisions [*Mattison*, *supra* and *Laury v General*

Motors Corp (On Remand, On Rehearing), *infra*] of our Court were wrongly decided. Far from lacking merit, appellant's contentions should be heard and resolved by this Court." (31a).

This Court in granting leave to appeal added: "Persons or groups interested in the determination of the question may move the Court for permission to file briefs amicus curiae." (32a).

Today, the Michigan Self-Insurers' Association and Michigan Manufacturers' Association have filed a joint motion with the Court seeking permission to file the instant brief because they are groups interested in resolution of this question. What follows is the Michigan Self-Insurers' Association's [MSIA]'s and Michigan Manufacturers' Association's [MMA]'s brief in support of defendant.

ARGUMENT

THE MERE SYMPTOMATIC EXPRESSION OF A NON-WORK-RELATED CONDITION AT THE WORKPLACE IS NOT ACTIONABLE UNDER THE WORKER'S DISABILITY COMPENSATION ACT.

Workers' compensation liability does not follow simply because a non-work-related condition expresses itself while the employee is working. When an employee is limited by a non-work-related condition and undertakes an activity at the workplace precluded by that condition, symptoms of the condition will necessarily manifest themselves. Such manifestation of symptoms is not actionable, particularly in cases such as the instant one governed by MCL 418.301(2). The Court should use this case to reiterate this legal point because the Court of Appeals has not been following Supreme Court precedent.

A. The "Personal Injury" Requirement.

The provision in the Worker's Disability Compensation Act defining actionable injuries says:

> An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. MCL 418.301(1) [first sentence].

Application of the "personal injury" portion of this provision had once triggered debate. That debate related to the fact that elsewhere in the workers' compensation statute at the time there were references to "accidental" injuries. Therefore, debate ensued on whether in application of the "personal injury" requirement there must also be inquiry into whether an

"accident" occurred.[1] The workers' compensation statute's references to "accidental" injury were excised long ago. Therefore, the "accident" debate is over. However, an unfortunate byproduct of that debate was interjection of a "work relatedness" element into the "personal injury" inquiry. In *Deziel v Difco Laboratories (After Remand)*, 403 Mich 1; 268 NW2d 1 (1978), for example, the Court went so far as to define a "personal injury" as a "precipitating work-related event." *Deziel*, *supra* at 37.

The Court should appreciate at the outset that nothing within the words "personal injury" contemplates inquiry into the work relatedness of the condition. The work relatedness inquiry is the province of the phrase which follows the "personal injury" requirement, *i.e.*, the "arising out of and in the course of employment" requirements. Put differently, the words "personal injury" ask whether an "injury" affects the "person" of the employee. A person can sustain a "personal injury" at work or away from work. Only after first establishing a "personal injury" does the work relatedness of that personal injury become relevant. Confusion can result by unnecessarily mixing the question: "did a 'personal injury' occur?" with the question: "is the 'personal injury' work-related?"

B. Supreme Court Case Law With Respect To "Personal Injury".

Some cases have correctly differentiated the "personal injury" requirement from the work relationship requirement. In *Miklik v Michigan Special Machine Co*, 415 Mich 364; 329 NW2d 713 (1982), the Court said:

> In all successful workers' compensation cases, the claimant must establish by a preponderance of the evidence both a personal injury and a relationship

[1] See generally, *Hagopian v Highland Park*, 313 Mich 608, 612-613; 22 NW2d 116 (1946); *Wieda v American Box Board Co*, 343 Mich 182, 191; 72 NW2d 13 (1955); *Sheppard v Michigan National Bank*, 348 Mich 577; 83 NW2d 614 (1957).

> between the injury and the workplace. ... Only if the first question is answered affirmatively need the second be asked. *Id.* at 367.

Miklik also correctly distinguished damage inflicted by a "personal injury" from damage incident to the disease process itself. *Miklik* says:

> It is impossible to turn [pre-existing] arteriosclerosis into compensable heart damage merely by labeling it so. The board's opinion, worded in conclusory terms, ignored this premise of *Kostamo*. Testimony, at most, showed the progressive effects of arteriosclerosis, not *separate* heart damage. *Id.* at 369 (emphasis in original; bracketed words added).

See also, *Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979) [Compensation does not follow "because the (pre-existing) debility has progressed to the point where the worker cannot work without pain or injury." *Id.* at 116 (parenthetical words added).].

In *Marman v Detroit Edison Co*, 268 Mich 166; 255 NW 750 (1934), the Court had earlier made the same point:

> Personal injury implies something more than changes in the human system incident to the general process of nature or existing disease or weakened physical condition. The term, as in employed in the compensation act, contemplates some intervention which either produces a direct injury or so operates upon an existing physical condition as to cause an injurious result, reasonably traceable thereto. *Id.* at 167.

These cases recognize a person is not "injured" if there is no damage to the person. Stated differently, where work activities merely illustrate a pre-existing problem is present and that pre-existing problem causes pain upon engagement in certain activities, manifestation of such pain is no proof an "injury" has occurred. Something more than the mere

expression of a pre-existing problem at the workplace is necessary to demonstrate the employee has suffered an injury.

C. Why A Symptomatic Manifestation Of A Prior Problem, Standing Alone, Is Not Compensable.

Amici curiae submit the correct understanding of the law is as follows. If the work contributes to, aggravates, or accelerates the underlying condition by causing separate or additional damage, then a "personal injury" has occurred. See generally, *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243, 253-254; 262 NW2d 629 (1978). By contrast, if work only confirms the presence of a pre-existing condition, a personal injury has not occurred. Under the latter situation, work is only serving as the forum where the painful symptoms express themselves. See, *Castillo v General Motors Corp*, 105 Mich App 776, 779 and 782; 307 NW2d 417 (1981) and *Weinmann v General Motors Corp*, 152 Mich App 690, 697; 394 NW2d 73 (1986).

With no intent to minimize the gravity of the instant subject matter, a simple illustration of this subtle point is the adage of a person saying to his doctor: "Doctor, it hurts when I do this" (for example, lifting an arm above shoulder level), with the doctor replying: "My advice is don't do that." A person lifting his arm above shoulder level while performing a work duty will expectedly feel pain as the result of engaging in a maneuver blocked by a pre-existing limitation. Such provocation of pain at the workplace is no "personal injury." It is instead confirmation of an already extant underlying condition limiting what the person can do.[2]

[2] The Worker's Compensation Appellate Commission correctly noted in its opinion in this matter that duration of the symptomatic manifestation of pain is often important in distinguishing between, on the one hand, mere manifestation of the symptoms of a condition and, on the other hand, aggravation of the underlying condition itself. (27a-28a). Transient expression of pain is unlikely to signal additional damage, as opposed to serving as a warning against continued engagement in the prohibited maneuver. Conversely, unremitting pain for a long duration may signal additional damage to the person's pre-existing condition. While the former is not a "personal injury," the latter can be. In the instant case, it is undisputed that nothing more than a symptomatic aggravation occurred with no separate or additional damage to the underlying condition despite its duration. (21a; 26a).

Miklik made this point in a § 301(1) context by emphasizing the employee must demonstrate "separate" damage beyond the effects of the underlying disease itself. Such inquiry into whether the requisite "damage" has occurred can be especially difficult where the underlying disease is progressive, such as the arteriosclerosis at issue in *Miklik*. A progressive disease, by definition, will worsen with time. Therefore, proof that a condition is worse today than previously is *not*, standing alone, sufficient to prove the requisite "damage." It is insufficient because "[p]ersonal injury implies something more than changes in the human system incident to the ... process of nature or existing disease." *Marman* at 167. It is insufficient because "the progressive effects of [the disease process is] not *separate* damage." *Miklik* at 369 (emphasis in original; bracketed words added).

It is the special difficulty in identifying damage when a progressive disease is present which led the Legislature to enact MCL 418.301(2).[3] In § 301(2), the Legislature created an additional hurdle for employees seeking benefits for "conditions of the aging process." Because "mental disabilities" had also proven a difficult area in terms of identifying damage and assessing the work-relatedness, the Legislature included mental disabilities in § 301(2) as well. These additional § 301(2) requirements were necessary because the Legislature recognized wholesale recovery was following application of the usual rules alone. This Court first recognized in *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993):

> The body of legislative reforms enacted in the early 1980's, including the significant manner amendments, were designed to impose on claimants a higher standard of proof ...". *Id.* at 216.

[3] The "occupational disease" chapter of the workers' compensation statute contains the same provision. See, MCL 418.401(2)(b).

The Court reiterated in *Gardner v Van Buren Public Schools*, 445 Mich 23; 517 NW2d 1 (1994):

> Apparently, some members of the Legislature believed that the unamended statute did not prescribe definite standards as to what constitutes compensable heart or mental disabilities. Workers' Compensation Reform Task Force, *Report of the Special Committee to Study Workers' Compensation*, December 1980, Issue No. 2c. Moreover, proponents of the bill maintained that the 'the lack of such standards has led to reckless judicial interpretation of the disability standard as it applies to heart and mental cases resulting in compensation being paid to workers whose disability was not work related.'" *Id.* at 40.

The resultant "higher standard" prescribed by the Legislature for these conditions of amorphous etiology provides:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner.[4]

Farrington in addressing a § 301(2) condition said the following in relationship to the instant controversy:

> Thus, the legislative policy evidenced for heart disease after the 1982 amendments would restrict benefits to claimants under the second prong of *Kostamo*, as is in the instant case, who could establish that their heart disease and injury were significantly caused or aggravated by employment.[5] *Included in this standard is the requirement that claimants also prove that the alleged cardiac injury resulting from work activities went beyond the manifestation of symptoms of the*

[4] The provision continues with a second sentence devoted exclusively to mental disabilities. The second sentence addresses a problem peculiar to mental disabilities resulting from this Court's "honest perception" test in the mental disability case *Deziel, supra.* See, *Robertson v DaimlerChrysler Corp,* 465 Mich 732; 641 NW2d 567 (2002). That second sentence is not presently at issue.

[5] The *Farrington* Court was here responding to a somewhat convoluted argument made by the employee in that case. The employee argued the Legislature responded to only one part of *Kostamo*. *Farrington* rejected the claimant's argument that § 301(2)'s significant manner requirement was so restricted.

> *underlying disease.* The heart injury must be significantly caused or aggravated by employment considering the totality of all the occupational factors and the claimant's health circumstances and nonoccupational factors.[17]
>
> [17] Even though a claimant's everyday work activities might contribute to a heart injury in a significant manner, a factfinder must also consider the causal effect of everyday work activities in relation to the claimant's other, non-occupational factors. These factors would include, for example, age, weight, diet, previous cardiac ailments or injuries, genetic predispositions, and the claimant's consumption of alcohol and use of tobacco or other drugs. *Farrington*, *supra* at 217.[6]

Therefore, § 301(2) added a "higher standard" to the normal compensability requirements where a condition of the aging process or a mental disability is at issue. *Id.* at 216.[7] For such conditions, the employee must still prove an injury that "went beyond the manifestation of symptoms of the underlying disease" occurred, and also prove such "injury must be significantly caused or aggravated by employment". *Id.* at 217.

Farrington should have removed any doubt that mere manifestation of the symptoms of a pre-existing underlying condition was not actionable. But, it did not.

[6] This Court repeated this type of "significant manner" inquiry in *Gardner*, emphasizing the need to compare and weigh occupational and non-occupational factors so as to determine the relative significance of work events in the overall context of the condition. *Gardner* at 46-47; see also in this regard, *Lombardi v William Beaumont Hospital (On Remand)*, 199 Mich App 428; 502 NW2d 736 (1993). *Gardner* was reversed in part by this Court in *Robertson*, *supra*. That part of *Gardner* which was not reversed was *Gardner*'s discussion of the "significant manner" weighing process. *Robertson* overruled *Gardner* only with respect to *Gardner*'s discussion of the second sentence of § 301(2).

[7] *Miklik* and *Kostamo* also illustrate that passage of § 301(2) did not create for the first time compensability for heart, cardiovascular, aging process, and mental disabilities. Such conditions had already been compensable under § 301(1). As *Farrington* recognized, § 301(2) was *adding* a requirement to the normal compensability requirements, as opposed to creating compensation for such claims for the first time.

D. The Court of Appeals Has Not Applied This Precedent.

The Court of Appeals has not followed the precedent represented by *Farrington/Miklik/Marman*.

Laury v General Motors Corp (On Remand, On Rehearing), 207 Mich App 249; 523 NW2d 633 (1994), is the lead Court of Appeals' case in a § 301(1) context. *Mattison v Pontiac Osteopathic Hospital*, 242 Mich App 664; 620 NW2d 313 (2000), is the lead Court of Appeals' case in a § 301(2) context.

The *Laury* Court, on rehearing, considered itself bound by *Court of Appeals'* precedent that manifestation of the symptoms of a pre-existing problem constitutes an "injury." Although disagreeing with such Court of Appeals' precedent as incompatible with other case law, *Laury* felt "constrained" to adhere to prior Court of Appeals' cases on point due to the requirement it follow prior Court of Appeals' precedent. *Id.* at 251.[8]

In *Mattison*, the Court of Appeals explicitly rejected *Farrington*'s statement with respect to "aggravation of symptoms" characterizing it "dictum and specifically referr[ing] to cardiac cases" only. *Mattison* at 673.[9] Yet, *Gardner* had recognized *Farrington* applied to more than just cardiac cases. The mental disability case *Gardner* said:

> The significant manner requirement also imposes on claimants a higher standard of proof. *Farrington* [citation omitted]. Although *Farrington* deals specifically with heart disease, the significant manner requirement at issue in that case is the same

[8] At the time of *Laury*, the requirement to follow Court of Appeals' precedent was found in Administrative Order No. 1994-4 and Administrative Order No. 1992-9 requiring such adherence but also allowing for a special panel to resolve a conflict in views. (Today, see MCR 7.215(I)). In *Laury*, the Court of Appeals as a whole declined (in a 15-7 vote with one abstention) to convene a special panel to resolve the divergence of views. 207 Mich App 801; 524 NW2d 270 (1994). *Laury* thereafter had an interesting history. On further appeal to this Court, the Court held the employer's application in abeyance "it appearing to this Court that the case of *McGeathy v General Motors Corp* (Docket No. 101408) is pending on appeal before this Court" and raised a similar issue. *Laury*, 539 NW2d 502 (1995). This Court later vacated the leave grant in *McGeathy* and then did the same in *Laury*. *McGeathy*, 549 NW2d 574 (1996) and *Laury* at 453 Mich 873; 554 NW2d 3 (1996), respectively.

[9] *Mattison*'s reasoning is similar to the reasoning offered by the Court of Appeals in *Fox*. See, n 11, *infra*.

> requirement we are construing here. It is, in fact, contained in the very same provisions. Not surprisingly, the analysis in *Farrington* for determining the significance of work-related events applies in mental disability as well. *Id.* at 47.

E. Conclusion.

The Court in *Miklik* found it necessary to reiterate legal rulings made in *Kostamo*, given post-*Kostamo* renegade opinions from the Court of Appeals.[10] Here, the Court needs to reiterate what it had said in *Farrington* and *Miklik*. Mere manifestation of the symptoms of a pre-existing condition, standing alone, is no "personal injury," especially in a case governed by § 301(2)'s "higher standard" that work contribute "in a significant manner" toward the underlying condition.

Amici curiae request that the Court explicitly disapprove *Mattison* and *Laury* and reaffirm the rule expressed in *Farrington* and *Miklik*. Where work only prompts the symptoms of a pre-existing problem such symptomatic expression of an underlying problem while working, is not, as a matter of law, a "personal injury" and most certainly not a personal injury contributed to "in a significant manner" by the workplace.

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[10] *E.g.*, *Fox v Detroit Plastic Molding*, 106 Mich App 749, 755; 308 NW2d 633 (1981) ["The above excerpt (from *Kostamo*) certainly seems to indicate that the Supreme Court is taking judicial notice that arteriosclerosis is not aggravated by stress. However, we reject this view as will be detailed below. The quotation constitutes dicta which we are not bound to follow." (parenthetical words added)]. This Court disagreed, reversing and remanding in *Fox*. 417 Mich 901; 330 NW2d 690 (1983). Compare also, *Peterson v While Pine Copper Co*, 93 Mich App 742; 286 NW2d 911 (1979), *vacated and rem*, 408 Mich 913; 315 NW2d 926 (1980).

RELIEF

WHEREFORE, *amici curiae*, Michigan Self-Insurers' Association and Michigan Manufacturers' Association, request that the Court hold that the mere manifestation at the workplace of symptoms of non-work-related problem are not actionable and reverse the decisions below.

Respectfully submitted,

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